

United States  
1 1286  
Circuit Court of Appeals  
For the Ninth Circuit.

HERTA MARLOW,

Appellant,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

FILED

JAN 14 1921

F. D. MONCKTON,  
CLERK.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

ERNEST K. LITTLE, Esq., Attorney for Herta  
Marlow, Appellant.

Foxcroft Building, San Francisco, Cal.

WALTON C. WEBB, Esq., Attorney for Charles  
Paganini, as Admr., Appellee,

Claus Spreckels Building, San Francisco,  
California.

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, Second Division.

No. 512.—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Decree.**

IT APPEARING TO THE COURT that plaintiff, New York Life Insurance Company, a corporation, has heretofore filed its bill of interpleader herein, offering to pay into court the sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars, and praying for a decree that the defendants herein be required to interplead and litigate their respective claims to the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65)

Dollars, and that said plaintiff be released from all claims or demands against it by the said defendants, or any or either of them, on account of any of the matters or things contained in the said bill of interpleader;

AND IT FURTHER APPEARING that the said plaintiff has paid into this court the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars; [1\*]

AND IT FURTHER APPEARING that said plaintiff is entitled to be repaid for its costs herein expended in the sum of Seventeen and 45/100 (17.45) Dollars, and that it is entitled to compensation for the services of its solicitors herein in the sum of Two Hundred Fifty (250) Dollars; and that the parties to the above-entitled action have stipulated by their respective counsel that the said plaintiff be released and discharged from all obligation and liability on account of any of the matters or things set out in plaintiff's bill of interpleader herein;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that said plaintiff, New York Life Insurance Company, a corporation, be released from all liability to the defendants, or any or either of them, on account of any of the matters or things referred to in plaintiff's bill of interpleader herein, and particularly on account of all claims arising out of or on account of that certain policy of insurance, or the proceeds thereof, which said policy was issued by plaintiff, New York Life Insurance Company,

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\*Page-number appearing at foot of page of original certified Transcript of Record.



a corporation, upon the life of one David K. Marlow in the sum of Five Thousand (5,000) Dollars, said policy of insurance being numbered six million one hundred forty-seven thousand eight hundred forty-three (6,147,843), and dated May 29, 1917.

IT IS FURTHER ORDERED that the said defendants, and each of them, their agents, servants and attorneys, be and they are each and all of them hereby forever enjoined and restrained from making any claim against said New York Life Insurance Company, a corporation, on account of the said insurance policy, and particularly [2] from commencing or proceeding with any action or actions or suit or suits against the said company in any court or courts on account of the said policy of insurance, or the proceeds thereof, or any manner or thing in relation thereto.

IT IS FURTHER ORDERED, that the clerk of this court forthwith pay to the said plaintiff out of the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars, deposited as aforesaid, the sum of Two Hundred Sixty-seven and 45/100 (267.45) Dollars, allowed as solicitor's fees and costs; and

IT IS FURTHER ORDERED, that this action be continued as between the defendants Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and Herta Marlow, to determine the ownership of the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars, less the sum of Two Hundred Sixty-seven and 45/100 (267.45) Dollars, paid as above directed as solicitors' fees and costs; and for that purpose the de-

fendant Herta Marlow may within forty days from the date hereof, file with the clerk of this court a written statement on oath of the matters and things herein in controversy, and of the facts and circumstances upon which her claim is founded; which said statement may within twenty days thereafter be answered by the defendant Charles Paganini, as administrator of the estate of David K. Marlow, deceased.

Dated this 6th day of July, 1920.

WM. H. HUNT,

Judge of the said Court. [3]

WE HEREBY STIPULATE to the entry of the foregoing decree, and agree that the sum of Two Hundred Sixty-seven and 45/100 (267.45) Dollars shall be paid to plaintiff, New York Life Insurance Company, a corporation, as solicitors' fees and costs, and that the said plaintiff, New York Life Insurance Company, a corporation, be released and discharged from all claims on account of any of the matters or things mentioned in its bill of interpleader herein.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitors for Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased.

ERNEST K. LITTLE,

Solicitors for Defendant Herta Marlow.

J. M. MANNON,

McCUTCHEN, WILLARD, MANNON &  
GREENE,

Solicitors for Plaintiff.

[Endorsed]: Filed and entered July 6, 1920.  
Walter B. Maling, Clerk. [4]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, Second Division.

No. 512.—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Written Statement of Herta Marlow of the Facts and  
Circumstances Upon Which Her Claim is  
Founded.**

Now comes the defendant Herta Marlow and pursuant to the order and decree of this Court given and entered on the 6th day of July, 1920, makes and files her written statement on oath of the matters and things in controversy, and of the facts and circumstances upon which her claim is founded, as follows:

I.

That plaintiff is and at and during all of the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the

State of New York, engaged in the business of making contracts of insurance on the lives of individuals and transacting other business incident to or usually connected with a general life insurance business, having its home office and principal place of business in the City of New York, State of New York.

## II.

That on May 29, 1917, plaintiff entered into a contract [5] with the said David K. Marlow, evidenced by its written policy of insurance number six million one hundred forty-seven thousand eight hundred forty-three (6,147,843); that a true and correct copy of said policy of insurance is attached to plaintiff's bill of interpleader herein, marked Exhibit "A," and is hereby referred to and made a part hereof. That in and by said insurance policy plaintiff undertook to and did insure the life of said David K. Marlow for the sum of Five Thousand (5,000) Dollars, payable to his executors, administrators or assigns, or to the duly designated beneficiary, upon receipt of due proof of the death of the said David K. Marlow.

## III.

That said policy expressly provided that the insured, David K. Marlow, had the right to change the beneficiary thereof, said provision being in the words and figures following:

"CHANGE OF BENEFICIARY.—The Insured may at any time, and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary

must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured is living at the time of such indorsement or not. In the event of the death of any beneficiary before the Insured, the interest of such beneficiary shall vest in the Insured."

#### IV.

That the provision of said policy in relation to assignment thereof was as follows:

"ASSIGNMENT.—Any assignment of this policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment."

#### V.

That on the 18th day of March, 1918, the said David K. Marlow filed at the San Francisco Branch Office of the plaintiff a direction in due form to change the beneficiary of said policy [6] to Miss Jennie Heppner, which said change of beneficiary was thereafter forwarded to the Home Office of the plaintiff at the city of New York, in the State of New York, and was never canceled, recalled or annulled by said David K. Marlow.

#### VI.

That said David K. Marlow never made any assign-

ment of said policy in duplicate, or in writing or at all, except that prior to the 18th day of March, 1918, said David K. Marlow deposited said policy with one Ben Janowitz as security for the payment to said Ben Janowitz of certain moneys due or to become due under a certain contract dated November 15th, 1917, and certain promissory note accompanying said contract.

#### VII.

That on the 30th day of May, 1919, David K. Marlow died at the city and county of San Francisco, State of California, and thereafter satisfactory proofs of death were furnished to and accepted as sufficient by said plaintiff.

#### VIII.

That on said date, May 30th, 1919, said policy of life insurance was still in possession of said Ben Janowitz and was held by him as security for the sum of \$491.12, with interest thereon from November 15th, 1917, which said sum was then due and owing from said David K. Marlow to said Ben Janowitz.

#### IX.

That on or about the 1st day of October, 1919, Miss Jennie Heppner assigned, sold, transferred and set over unto this defendant, Herta Marlow, all her right, title and interest in and to said policy of life insurance or the proceeds thereof, by virtue of said designation of said Miss Jennie Heppner as beneficiary or otherwise; and ever since said date the said Herta Marlow has been and now is the owner and holder thereof. [7]



## X.

That on the 20th day of October, 1919, this defendant, Herta Marlow, for a valuable consideration, purchased from Ben Janowitz all of his said claim against David K. Marlow, deceased, amounting to the sum of \$491.12 and interest as aforesaid, whereupon and as a part of the consideration for such purchase the said Ben Janowitz delivered to said Herta Marlow the policy of life insurance aforesaid, so held by said Ben Janowitz as collateral security for the payment of said sums.

## XI.

That a true and correct copy of said assignment from Ben Janowitz, dated October 20th, 1919, is hereto attached and marked Exhibit "A" and is hereby referred to and made a part hereof.

## XII.

That no part of said sums referred to in said assignment amounting to the sum of \$491.12, exclusive of interest, has ever been paid and the whole thereof is now and at all times since the 20th day of October, 1919, has been due and owing to said Herta Marlow, who is still the owner thereof by virtue of said assignment.

## XIII.

That during the month of November, 1919, while said designation of beneficiary dated March 18, 1918, referred to in paragraph V hereof, was at the home office of plaintiff in the city of New York, said Herta Marlow presented said policy to plaintiff at its said home office and demanded that said change of beneficiary be endorsed thereon and that the

amount due under said policy be paid to her, as the assignee of Miss Jennie Heppner or as the assignee of Ben Janowitz or as the assignee of both Miss Jennie Heppner and Ben Janowitz. [8]

#### XIV.

That this defendant, Herta Marlow, claims that under the provisions of section 2764 of the Civil Code of the State of California, the insured, David K. Marlow, had an absolute right to transfer said policy and the proceeds thereof to Miss Jennie Heppner, subject only to such prior rights, if any, which may have been acquired by Ben Janowitz, as pledgee; and that upon the death of said David K. Marlow the proceeds of said policy were payable to Miss Jennie Heppner, subject only to the possible claim of Ben Janowitz, under section 3008 of the Civil Code of the State of California, to have said proceeds first paid to him as pledgee of said policy. And this defendant, Herta Marlow, claims that, the conflicting rights and claims of Miss Jennie Heppner and of Ben Janowitz, having both been assigned to her, and the title to all of said conflicting rights and claims being now merged in her, the said Herta Marlow, no other person or persons have any right, title of interest in or claim to the proceeds of said policy whatsoever.

ERNEST K. LITTLE,

Solicitor for Defendant Herta Marlow. [9]



**Excerpts from Policy of Insurance No. 6,147,843 of  
New York Life Ins. Co., Attached to Original  
Complaint.**

Chartered 1841.

**NEW YORK LIFE INSURANCE COMPANY.**

**AGREES TO PAY**

Beneficiary to the Executors, Administrators or As-  
signs of the insured, or to the duly desig-  
nated \* \* \*

Beneficiary

(with the right on the part of the Insured to change the  
Beneficiary in the manner provided in Section 6)

Face  
Amount

\*\*\*FIVE THOUSAND\*\*\* Dollars

(the face of this Policy)

upon receipt of due proof of the death of

Insured

\*\*\*DAVID K. MARLOW\*\*\* the Insured.

**Section 6—Other Benefits and Provisions.**

**Assignment.**—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

**Change of Beneficiary.**—The Insured may at any time, and from time to time, change the beneficiary, provided this Policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such in-

dorsement or not. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured.

**Miscellaneous Provisions.**—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract.

6. I designate as Beneficiary to receive the proceeds of policy in event of death, and reserve the right to change the Beneficiary from time to time,—Beneficiary (Give name in full) Estate.

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application; 2. That any payment made by me before delivery of the policy to, and its receipt by, me as aforesaid shall be binding on the Company only in accordance with the terms of the Company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment; 3. That only the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts or waive any of the Company's rights or requirements, and that none of these acts can be done by the agent taking this application.

DAVID KLIENERT MARLOW,

**Exhibit "A."**

KNOW ALL MEN BY THESE PRESENTS: That I, BEN JANOWITZ, for a valuable consideration to me paid do hereby sell, assign, transfer and set over unto HERTA MARLOW, her heirs and assigns all my right, title and interest in and to the certain instrument, bearing date, November 15th, 1917, and made between David K. Marlow and Graphic Printing Co., as first parties and the undersigned as second party together with all moneys due thereunder. And I do, simultaneously with the execution and delivery of this instrument deliver to said Herta Marlow

(a) Four promissory notes of the sum of \$15.00 each, dated November 15th, 1917;

Eight promissory notes of the sum of \$17.50 each, dated November 15th, 1917;

Four promissory notes of the sum of \$20.00 each, dated November 15th, 1917;

One promissory note of the sum of \$30.00 dated November 15th, 1917;

(b) The certain Policy of Insurance issued by New York Life Insurance Co., on the life of David K. Marlow and numbered 6,147,843.

which said notes and policy of life insurance are referred to in said instrument above described.

And I do hereby warrant and represent that under said instrument none of said notes has been paid; and that there is due to me under said agreement exclusive of said notes and interest the sum of \$79.12 paid to Remedial Loan Association and the

sum of \$92.00 and interest paid to Gemillath Chasodim Society.

Dated, San Francisco, Cal., October 20th, 1919.

BEN JANOWITZ. [10]

United States of America,  
Southern District of New York,—ss.

Herta Marlow, being duly sworn, deposes and says:

That she is one of the defendants named in the above-entitled action; that she has read the foregoing written statement of Herta Marlow of the facts and circumstances upon which her claim is founded, and knows the contents thereof; that the same is true except as to those matters therein stated upon her information and belief and as to such statements she believes the same to be true.

HERTA MARLOW.

Subscribed and sworn to before me this 27th day of July, 1920.

[Seal]

OTTO A. SAMUELS,  
Notary Public, New York County.

Term expires March 30, 1921.

Received a copy of the within verified statement of Herta Marlow this 2d day of August, 1920.

C. F. REINDOLLAR,  
WALTON C. WEBB,  
Attorneys for Charles Paganini, as Administrator, etc.

[Endorsed]: Filed Aug. 3, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

(Title of Court and Cause.)

**Answer of Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased, to Written Statement of Herta Marlow.**

Comes now the defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and answers the written statement of the defendant, Herta Marlow, on file in this action, and for such answer admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraphs I, II, III and IV and VII of said statement.

II.

Defendant alleges that he is without knowledge, information or belief as to the allegations of paragraphs V, VI, VIII, X, XI, XII and XIII, or any thereof, of said statement, and, placing his denial upon such ground, denies all the allegations of said paragraphs.

III.

Defendant denies that the defendant, Herta Marlow, is now, or was on the first day of October, 1919, or at any time prior or subsequent thereto, the owner or holder of the policy of life insurance mentioned in said statement or the proceeds thereof. As to the other allegations of paragraph IX of said statement defendant alleges that he is without knowledge, information or belief, and, placing his denial upon such ground, denies the same.

## IV.

Defendant denies that under the provisions of section 2764 of the Civil Code of the State of California, David K. Marlow had an absolute or any right to transfer said policy or the proceeds thereof to Jennie Heppner subject to any prior rights or otherwise, and denies that upon the death of said David K. [12] Marlow the proceeds of said policy or any thereof were payable to Jennie Heppner subject to any claim or otherwise. Defendant denies that defendant Herta Marlow has any right, title or interest in or claim to said policy or any of the proceeds thereof, and denies that the defendant has no right, title or interest in or claim to said policy or the proceeds thereof.

And as and for a further and separate answer this defendant alleges that said David K. Marlow died intestate on May 30, 1919, in, and was at the time of his death a resident of, the City and County of San Francisco, State of California, and that this defendant was by an order of the Superior Court of the City and County, of, San Francisco, State of California, duly given and made on the 26th day of February, 1920, appointed the administrator of the estate of said David K. Marlow, deceased, that this defendant thereupon duly qualified as such administrator and that letters of administration upon the estate of said deceased were duly issued to him on said 26th day of February, 1920, and that he ever since then has been and is now the duly appointed, qualified and acting administrator of the estate of said deceased. That



the policy of life insurance mentioned in said statement of the defendant, Herta Marlow, is payable to this defendant; that no beneficiary of said policy other than this defendant has ever been designated; that no assignment has been made of said policy, and that this defendant is entitled to the proceeds of said policy.

And as and for a further and separate answer this defendant alleges that he is informed and believes and upon such information and belief alleges that on the 18th day of March, 1918, and prior thereto and for some time thereafter said policy of life insurance was in the possession of Ben Janowitz, the same having been deposited with him by said David K. Marlow prior to March 18, 1918, as security for certain moneys owing from him to said Ben Janowitz, the amount of which is unknown to [13] this defendant, but is not as much as five hundred dollars (\$500).

WHEREFORE, this defendant prays that the Court decree that he is entitled to the proceeds of said policy and order that the same on deposit in this court be paid to this defendant, and for such other or further relief as is meet and proper in the premises.

C. F. REINDOLLAR,  
WALTON C. WEBB,  
Solicitors for said Defendant.

United States of America,  
City and County of San Francisco,  
State of California,—ss.

Charles Paganini, being first duly sworn, deposes

and says: That he is the administrator of the estate of David K. Marlow, deceased, one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein alleged upon his information and belief and as to such matters that he believes it to be true.

CHARLES PAGANINI.

Subscribed and sworn to before me this 19th day of August, 1920.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of  
San Francisco, State of California.

Received a copy of the within answer this 19th day of August, 1920.

ERNEST K. LITTLE,

Solicitor for Defendant Marlow.

Filed Aug. 20, 1920. W. B. Maling, Clerk. By  
J. A. Schaertzer, Deputy Clerk. [14]

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**(Order Designating Judge Rudkin to Sit in United  
States District Court for the Northern District  
of California.)**

WHEREAS, in my judgment, the public interest so requires, I hereby designate and appoint the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, to hold the District Court of the United States for the Northern District of California, dur-



ing the months of November and December, 1920, and to have and exercise within said district the same powers that are vested in the Judges thereof.

WITNESS my hand hereto this 11th day of October, 1920.

WM. B. GILBERT,  
Senior Circuit Judge of the Ninth Circuit.

[Endorsed]: Filed Nov. 8, 1920. Walter B. Mal-  
ing, Clerk. [15]

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In the Southern Division of the United States Dis-  
trict Court, for the Northern District of Cali-  
fornia, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

McCUTCHEN, WILLARD, MANNON &  
GREENE, Solicitors for Plaintiff.

C. F. REINDOLLAR, Esq., and WALTON C.  
WEBB, Esq., Solicitors for Defendant Charles  
Paganini, etc.

ERNEST K. LITTLE, Esq., Attorney for Defend-  
ant Herta Marlow.

**Memorandum.**

RUDKIN, District Judge.

This is a controversy over life insurance between the administrator of the estate of the insured and the assignee of one claiming to be a beneficiary duly designated under the terms of the policy. The policy bears date May 29th, 1917, and is payable "to the executors, administrators or assigns of the insured, or to the duly designated beneficiary, (with the right on the part of the insured to change the beneficiary in the manner provided in section 6)." Section 6 provides as follows:

"The Insured may at any time and from time to time, change the beneficiary provided this Policy is not [16] then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for the endorsement of the change thereon by the Company, and unless so endorsed the change shall not take effect. After such endorsement the change shall relate back to and take effect as of the date the insured signed said written notice of change whether the Insured be living at the time of such endorsement or not. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured."

The insured died on the 30th day of May, 1919, and satisfactory proofs of death have been furnished. On the 18th day of March, 1918, the insured

filed at the San Francisco branch of the company a direction to change the beneficiary to Miss Jennie Heppner. At that time, and thereafter continuously until after the death of the insured, the policy was in the possession of one Janwitz, in the City and County of San Francisco, as security for the repayment of certain moneys due Janwitz from the insured, and for that reason the insured was unable to surrender the policy or to procure the endorsement of the change of the beneficiary on the policy. Under these facts counsel for the administrator contend that there could be no change of beneficiary because of the assignment of the policy and that in any event no such change was made. Whether there was an assignment of the policy may admit of question. There is a difference between an assignment and a pledge as collateral security. In the case of an assignment the legal title vests in the assignee, whereas, in the case of a pledge the title remains in the pledgor subject to the lien. Again [17] there is a wide difference between an assignment and a change in the beneficiary. The insured may assign the policy as a matter of course without notice to the insurer, whereas, a change in the beneficiary creates a new contract between the insurer and the insured. If the insured in this case had done everything required of him to make the change, it may well be that a court of equity would consider as done that which ought to have been done. But no such state of facts is presented here. The insured lived for more than a year after notice of the intended change was given and no attempt was made by him to produce the policy and the policy was

never presented at the Home Office for endorsement and no such change was every endorsed upon the policy. Indeed, as I view the law, the insurer could not be compelled to make the change so long as the policy was pledged for the pledgee had an interest in the policy which was inconsistent with an absolute right on the part of the insured to insist upon a change of beneficiary. A decree will, therefore, be entered in favor of the administrator subject, of course, to the rights of the assignee of the pledgee.

November 26th, 1920.

[Endorsed]: Filed Nov. 27, 1920. Walter B. Mal-  
ing, Clerk. [17½]

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At a stated term, to wit, the November term, A. D. 1920, of the Southern Division of the United States District Court, for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 27th day of November, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court:

No. 512—EQUITY.

NEW YORK LIFE INSURANCE CO.

vs.

CHARLES PAGANINI, Administrator, etc., and  
HERTA MARLOW.

**(Order for Decree).**

This suit heretofore tried and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that a decree be signed, filed and entered, in accordance with said opinion, in favor of Charles Paganini, as administrator, etc., subject to the rights of the assignee of the pledgee. [18]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Decree.**

This cause came on to be heard at this November term, A. D. 1920, upon the written statement of the defendant, Herta Marlow, and the answer thereto of the defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and the oral admission of all the allegations of said

written statement, made by said last-named defendant in open court on said hearing, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

That defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, is the owner of and entitled to \$3,997.88 of the proceeds of the life insurance policy mentioned in said written statement on file herein, on deposit in this court, which sum of \$3,997.88 the clerk of this court is hereby directed to forthwith pay to said defendant out of said deposit.

That the defendant, Herta Marlow, is the owner of and [19] entitled to \$595.97 of the proceeds of said life insurance policy, on deposit in this court, which sum said clerk of said court is hereby directed to forthwith pay to said defendant out of said deposit.

That said clerk is entitled to the balance of said moneys on deposit in this court, to wit: \$49.35, as fees in this suit.

Dated this 2d day of December, 1920.

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed and entered December 2, 1920.  
Walter B. Maling, Clerk. By J. A. Schaertzer,  
Deputy Clerk. [20]



In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Statement of Evidence.**

This cause came on to be heard in the above-entitled court on the 10th day of November, 1920, before Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, designated to hold court in the United States District Court for the Northern District of California during the months of November and December, 1920.

Ernest K. Little, Esq., appearing as solicitor for defendant Herta Marlow, and C. F. Reindollar, Esq., and Walton C. Webb, Esq., appearing as solicitors for defendant Charles Paganini, as administrator of the estate of David K. Marlow, deceased.

The plaintiff having been released from all further liability by decree made and given the 6th day

of July, 1920, did not appear and was not represented.

Whereupon the following proceedings were had:

Solicitors for defendant Charles Paganini, as administrator of the estate of David K. Marlow, deceased, stated in open court [21] that said defendant admitted the truth of all of the allegations of the written statement of Herta Marlow of the facts and circumstances upon which her claim is founded, except paragraph XIV thereof, which contained a statement of the theory of her claim rather than any allegation of fact.

The Court directed that such admission of counsel be entered upon the record and that the testimony be closed.

The solicitors for the respective parties thereupon presented oral arguments, at the conclusion whereof the cause was submitted, the respective parties to furnish the Court with points and authorities in writing, which was done.

ERNEST K. LITTLE,

Solicitor for Defendant Herta Marlow.

We hereby stipulate that the foregoing statement of appeal is correct in all particulars and that the same may be immediately settled and allowed by the Court, the ten-day notice thereof being hereby waived.

WALTON C. WEBB,

C. F. REINDOLLAR,

Solicitors for Charles Paganini, as Administrator  
of the Estate of David K. Marlow, Deceased.



Statement allowed this 17th day of December, 1920.

FRANK H. RUDKIN,  
District Judge.

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Petition on Appeal of Defendant, Herta Marlow.**

The above-named defendant, Herta Marlow, considering herself aggrieved by the decree made and entered on the 2d day of December, 1920, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and she prays that this appeal may be allowed and that a transcript of the record, proceed-

ings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

ERNEST K. LITTLE,  
Solicitor for Defendant Herta Marlow.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Assignment of Errors.**

Herta Marlow, one of the defendants above named, and appellant, hereby assigns errors on the decree of the United States District Court for the Northern District of California, Second Division, in the above-entitled cause, dated the 2d day of December, 1920, and the memorandum opinion and order of Hon. Frank H. Rudkin, United States

District Judge for the Eastern District of Washington, designated to hold court in the Northern District of California, filed November 27th, 1920, in the following particulars:

First: Because said Court erred in holding that a designation of beneficiary or change of beneficiary in a life insurance policy must be endorsed in the policy during the lifetime of the insured, notwithstanding the fact that the policy provides that such endorsement may be made after the death of the insured.

Second: Because said Court erred in holding that the pledgee of an insurance policy has an interest in the policy [24] which is inconsistent with the right of the insured to designate or change the beneficiary.

Third: Because said Court erred in holding that the designation of beneficiary executed by the insured and filed with the agent of the insurance company during his lifetime was invalid because the policy was at the time deposited as a pledge.

Fourth: Because said Court erred in holding that the designation of beneficiary executed by the insured was invalid because not endorsed on the policy during the life of the insured, notwithstanding the fact that the policy provided that such endorsement might be made after the death of the insured.

Fifth: Because the said Court erred in decreeing that the proceeds of the policy of life insurance in question, or any part thereof, should be paid to the

defendant, Charles Paganini, as administrator of the estate of the insured.

Sixth: Because said Court erred in not decreeing that the proceeds of the policy of life insurance in question should be paid to the defendant, Herta Marlow, as the assignee of the interest of the designated beneficiary.

ERNEST K. LITTLE,  
Solicitor for Defendant Herta Marlow.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Order Allowing Appeal.**

The defendant, Herta Marlow, having heretofore filed herein her petition for appeal and assignment of errors, said appeal is allowed to petitioner, and Charles Paganini, as administrator of the estate of

David K. Marlow, deceased, may be made appellee, Said appeal is to operate as a supersedeas of the decree of December 2d, 1920, upon the execution of a bond in the penalty of \$250.

The National Surety Company is accepted on said bond as surety, and said bond is now approved.

W. H. HUNT,

Judge.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY,  
Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that National Surety Company, a corporation, organized under the laws of the State of New York, and authorized to become surety on bonds in the State of California, as surety, is held and firmly bound unto the above-named Charles Paganini, as

administrator of the estate of David K. Marlow, deceased, in the sum of Two Hundred and Fifty Dollars (\$250), to be paid to said Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and for the payment of which well and truly to be made, said National Surety Company binds itself and its successors, firmly by these presents.

Sealed with the seal of National Surety Company and dated this 8th day of December, 1920.

WHEREAS, the above-named Herta Marlow has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree made and given in the above-entitled suit in the United States District Court for the Northern District of California, in Equity, on the 2d day of December, 1920. [27]

NOW, THEREFORE, the condition of this obligation is such that if the above-named Herta Marlow shall prosecute her said appeal to effect and answer all damages and costs if she fail to make such appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[Seal] NATIONAL SURETY COMPANY.

By FRANK L. GILBERT,

Its Attorney in Fact. [28]

State of California,

City and County of San Francisco,—ss.

On this 8th day of December, in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for the City and



County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of  
San Francisco, State of California.

(The premium charged for this bond is Ten Dollars per annum.)

Bond approved—Dec. 9, 1920.

WM. H. HUNT, J.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the  
Estate of DAVID K. MARLOW, Deceased,  
and HERTA MARLOW,

Defendants.

**Praecipe for Transcript of Record.**

To the Clerk of the United States District Court:

Please prepare transcript of record on appeal from the final decree in the above-entitled suit and incorporate therein the following, viz.:

1. Interlocutory decree filed July 6th, 1920.
2. Written statement of Herta Marlow of the facts and circumstances upon which her claim is founded.
3. Order designating Judge Rudkin to hold court in the Northern District of California during the months of November and December, 1920.
4. Memorandum opinion of Judge Rudkin filed November 27, 1920.
5. Minute order of November 27, 1920.
6. Statement of Evidence.



7. Final decree of December 2d, 1920.
8. Petition for order allowing appeal. [30]
9. Assignment of errors.
10. Order allowing appeal.
11. Bond on appeal.
12. Citation.

ERNEST K. LITTLE,

Solicitor for Defendant and Appellant, Herta Marlow.

Due service and receipt of a copy of the within praecipe for transcript of record is hereby admitted this 23d day of December, 1920.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitor for Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased.

[Endorsed]: Filed Dec. 27, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

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(Title of Court and Cause.)

**Praecipe of Appellee as to Transcript of Record.**

To the Clerk of the United States District Court:

Please incorporate in the transcript of record on appeal in this suit, requested in and by the praecipe of the appellant, Herta Marlow, in addition to the papers and matters therein mentioned, the following:

I. The following excerpts from the Policy of Insurance mentioned in paragraph II of the written statement of Herta Marlow of the facts and

circumstances upon which her claim is founded and thereby made a part thereof, sufficiently identifying the same as portions of said policy or of the application attached thereto, as the case may be, viz.:

1. The first twelve lines of said policy, inserting said lines just as they appear in the policy with the indexing words in the same positions they there occupy.

2. The paragraphs of Section 6 thereof entitled "Assignment" and "Change of Beneficiary."

3. The first sentence of the paragraph of Section 6 thereof entitled "Miscellaneous Provisions," which sentence reads as follows: "The policy and the application therefor, copy of which is attached hereto, constitute the entire contract."

4. Section 6 of the application attached to said policy, which relates to the beneficiary thereof, and also so much of said application as shows the signature of David Kleinert Marlow thereto and that such paper is said application.

II. Answer of defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, to written statement of Herta Marlow.

Also please deliver to the United States Circuit Court of Appeals for the Ninth Circuit with such transcript of record [32] on appeal the policy of insurance annexed to the bill of interpleader in this suit on file in your office.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitors for Defendant and Appellee, Charles Paganini, as Administrator, etc.

It is hereby stipulated and agreed that the matters mentioned in the foregoing praecipe, in addition to the matters mentioned in the praecipe of the appellant Herta Marlow, be incorporated by the clerk of said court, in the transcript of record on appeal in this suit requested in and by said praecipe, and that the policy of insurance mentioned in the foregoing praecipe be delivered by the clerk as therein requested.

ERNEST K. LITTLE,

Solicitor for Defendant and Appellant, Herta Marlow.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitors for Defendant and Appellee, Charles Paganini, as Administrator, etc.

So ordered.

HUNT,

Judge.

[Endorsed]: Filed Jan. 3d, 1921. Walter B. Maling, Clerk. [33]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator, etc.,  
and HERTA MARLOW,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-three (33) pages, numbered from 1 to 33 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipis for transcript of record as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$13.90; that said amount was paid by Ernest K. Little, Esq., attorney for Herta Marlow; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 3d day of January, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [34]

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**Citation.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Herta Marlow, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Judicial Circuit, this 9th day of December, A. D. 1920.

WM. H. HUNT,

United States Circuit Judge.

United States of America,—ss.

On this 18th day of December, in the year of our Lord one thousand nine hundred and twenty, personally appeared before me, ——, the subscriber, Ernest K. Little, and makes oath that he delivered a true copy of the within citation to Walton C. Webb, attorney and solicitor for defendant and appellee, Charles Paganini, as administrator, etc., on the 10th day of December, 1920.

ERNEST K. LITTLE,

Subscribed and sworn to before me at San Francisco, Cal., this 18th day of December, A. D. 1920.

[Seal]

J. A. SCHAERTZER,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 512. United States District Court for the Northern District of California, Second Division. Herta Marlow, Appellant, vs. Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased. Citation on Appeal. Filed Dec. 18, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due service and receipt of a copy of the within Citation is hereby admitted this —— day of December, 1920.

\_\_\_\_\_,  
Solicitor for Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased.



[Endorsed]: No. 3629. United States Circuit Court of Appeals for the Ninth Circuit. Herta Marlow, Appellant, vs. Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased, Appellee. Transcript of Record. Upon Appeal from the Southern Division of United States District Court for the Northern District of California, Second Division.

Filed January 6, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

